

Office of
Personnel Management

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MEMORANDUM FOR DIRECTORS OF PERSONNEL

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SUBJECT: Planning for Lapsed Appropriations

OMB recently issued guidance on planning for closedown of agency activities necessitated by lapses in appropriations authority (OMB Bulletin No. 80-14 dated August 28, 1980). That bulletin mentions that OPM will issue additional guidance on personnel management issues involved in such situations.

Attached is an outline of personnel management areas to be addressed in planning for lapsed appropriations contingencies and a series of questions and answers covering employee rights and benefits. Our experience in this area is limited, and the guidance provided represents our initial thinking on this subject.

For additional assistance in planning, please contact your OPM agency officer. Also, Agency Relations will be tracking your approach to this problem so that we can identify additional policy issues to be addressed and possibly share the results of your efforts with other agencies.

Attachments

GUIDANCE FOR PERSONNEL PLANNING FOR LAPSED APPROPRIATIONS

This guidance is predicated on the assumption that funding interruptions will not exceed 30 days. (Should agency heads determine that interruption of funding is likely to continue for more than 30 days, the Office of Personnel Management should be consulted as to application of procedures prescribed in 5 CFR Part 351, Reduction in Force.) The first part of the Guidance identifies personnel management areas to be addressed in contingency planning. The second part provides specific information, in question and answer format, relating to employees' rights and benefits. Citations in parentheses refer to guidance contained in the U.S. Code (U.S.C.), Code of Federal Regulations (CFR), and Federal Personnel Manual (FPM). Additional requirements may be contained in applicable labor-management agreements.

I. Personnel Management Areas to be Addressed in Contingency Planning

- Determination of functions to be performed for orderly closedown.
- Determination of period of time necessary to accomplish closedown.
- Identification of essential positions for closedown activities.
- Plan to recall incumbents of essential positions who are on leave.
- Identification of employees to be released at various times during and at completion of orderly closedown.
- Explanation of the situation to employees to be retained. It is probably in their best interests to report for work if the agency has determined that their services are allowed.
- Notification, consultation, and/or negotiation with labor organizations, as appropriate (5 U.S.C. Chapter 71).
- Notification to employees to be released (5 U.S.C. 7511-7514; 5 CFR Part 752).
- Dissemination to employees of information concerning rights and benefits for furloughed employees.
- Procedures for recalling employees--or terminating employees (including those on furlough) if appropriation is passed at reduced level.
- Communication system for keeping all employees fully informed.

II. Questions and Answers on Employee Rights and Benefits

Q. Upon a lapse in appropriations, may an agency's employees continue to work?

A. They may not continue to perform functions necessary to accomplish the agency's mission, but they may be asked to perform duties required to shut down the agency. However, no employee is required to work during a period for which no funds are available. An agency's acceptance of employees' services during this shut down period would not violate the prohibition on acceptance of voluntary services because it is an emergency situation. (31 U. S. C. 665 (b))

However, salary payments will not be made until funding is provided by the Congress.

Q. What personnel action is appropriate for those who do not work or who have completed work on orderly termination?

A. The agency should place its employees in a non-duty and non-pay status.

This can be accomplished by the use of a furlough under adverse action procedures (5 CFR part 752).

Q. Can employees appeal a furlough action?

A. Since a furlough of 30 days or less is an adverse action, certain employees will be entitled to appeal the action to the Merit Systems Protection Board (5 CFR part 752). Employees who are in the competitive civil service, and have

completed one year of current continuous employment under an appointment other than a temporary appointment, may appeal the adverse action to the MSPB. Preference eligibles in the excepted service may appeal to MSPB if they have completed one year of current continuous service in the same or similar positions. However, certain employees, including those who are serving in probationary status, do not have any adverse action appeal rights.

Employees who have appeal rights to MSPB and are covered by a collective bargaining agreement may elect to file a grievance under the negotiated grievance procedure, if applicable. (5 U.S.C. 7121 (e) (1)) Employees with neither MSPB appeal rights nor access to negotiated grievance procedures may file under an agency grievance procedure. Any employee may, of course, file a complaint with the Special Counsel if he or she believes that the action has been taken in violation of law, rule, or regulation. All employees have the right to file discrimination complaints if they feel they have been discriminated against on the basis of race, sex, color, religion, national origin, age, or handicap.

Q. What notice to employees is required for furlough?

A. Ordinarily, a minimum of 30 days' notice is required for furlough. Since it is generally assumed that Congress will provide appropriations authority on schedule, a sudden unplanned lapse in appropriations authority may create an emergency situation. Under such circumstances, the 30 day notice may be waived (5 CFR 752.404(d)(3)).

A. Normally, yes. Other than conflict of interest prohibitions, there is no restriction on Federal employees' taking additional jobs outside the Federal service. The law (5 U.S.C. 5533) generally prohibits an employee from receiving pay for more than one Federal position for more than a total of 40 hours in one calendar week. However, in this case, since the employees would not be working for their "primary" employer, they would be free to take any other employment, subject to any conflict of interest prohibitions which may apply.

Q. How would furlough affect waiting periods for completion of probation and the service requirement for career tenure?

A. The employee would receive "free" credit for 22 work days toward completion of the probationary period and 30 calendar days toward completion of career tenure requirements. Any furlough time in excess of these amounts would not be counted toward completion of probation or the service requirement for career tenure. (FPM Chapter 315).

Procedural requirements

Q. If, after employees have been on furlough for 30 days, short term fundings were made available and then lapsed again, could adverse action (Part 752) procedures be used for the second furlough?

A. Yes.

Employees not covered by Part 752

Q. May employees who are not covered by Part 752 be furloughed?

A. Yes. Temporary employees and those serving probationary periods are not covered by Part 752 procedures. It is necessary only to notify them that they will be furloughed on a certain date. Excepted employees are covered under Part 752 for furlough purposes if they are preference eligibles who have completed one year of current continuous service in the same or similar positions. Thus, they are entitled to full procedural protection. Excepted employees who are not preference eligibles who have completed the year of service requirement may be treated as temporaries.

Q. What notice requirement and release procedures apply to Senior Executives?

A. As far as furloughs are concerned, SES members are not covered by subchapter II of Chapter 75, Title 5, U.S. Code (applying adverse action procedures to furloughs for 30 days or less). Therefore, notice requirements and release procedures for SES members are within the jurisdiction of the individual agency; and there is no appeal right.

Q. How shall furloughs be documented?

A. A Standard Form 50 (SF-50) or approved equivalent form shall be executed for furloughed employees using the appropriate PAC/NOA code, e.g., for a furlough of less or more than 30 days. If the agency desires, it may use the list form of notice to process the furlough actions. Instructions for preparing a list form of notice are found in Table 6 of Book V of FPM Supplement 296-31. These same procedures shall be used to process the subsequent return to duty actions.

Q. What action is required should a furloughed employee resign or find employment in another agency?

A. Under such circumstances, the processing actions necessary to effect either a resignation or a separation are described in Subtable 11 of Book V, FPM Supplement 296-31. The employee does not have to be returned to duty before the resignation or separation action is processed. The remarks section of the SF-50 or approved equivalent form for the resignation or separation should show "From furlough effective (date)."

The PAC/NOA's which will normally be used for these actions are:

- 317 - Resignation
- 320 - Separation-Transfer (if under Reg. 315.501)
- 321 - Separation-Appointment in (agency)*
- 311 - Resignation-Appointment in (agency)*

***These codes are to be used when the employee accepts an appointment in another agency other than by transfer under Regulation 315.501.**

Q. Who processes personnel actions during a period of lapsed appropriations?

A. Such work should be done by employees retained for orderly closedown.

Q. What data should be provided to the Central Personnel Data File (CPDF) when an agency is in an orderly shutdown mode?

A. Agencies need not provide data to CPDF while in an orderly shutdown mode. Agencies should contact the CPDF Systems Manager on 632-4425 once funding is received and when employees are returned to normal duties for instructions as to what data should be submitted to CPDF.

Labor-Management Relations Concerns

Q Can an employee grieve the procedure used to issue an adverse action furlough notice under a negotiated grievance/arbitration procedure?

A Yes, if matters covered under 5 USC 7512 (adverse actions) are not excluded from the negotiated grievance/arbitration procedure.

Q What procedures should an agency follow for handling pending labor-management relations cases?

A Grievances - contact each labor organization and work out an appropriate arrangement to insure that employees retain their rights while at the same time insuring that agency management will be able to respond to each grievance in a timely manner at an appropriate level within the organization after the agency returns to work.

Unfair Labor Practices - inform the FLRA Regional Director of a need for an extension of the time for filing an answer to any pending complaint(s) or any charge(s) filed during the shutdown period [5 CFR 2423.13]; if a hearing has been scheduled, contact the administrative law judge assigned to the case or the Chief Administrative Law Judge and inform him of the circumstances and the need for a postponement [5 CFR 2423.19].

Other Matters Before The FLRA - inform the Executive Director of the FLRA or the General Counsel of a need to waive any time limit; if possible, this should be done in writing no later than 5 days

before the established time limit (5 CFR 2429.23).

Q What collective bargaining obligations does an agency have when developing plans for orderly shutdown?

A Agencies should maintain constant and open communications with labor organizations when there is any likelihood of an appropriations lapse. Agency management has the authority under 5 USC 7106(a)(2)(D) to take whatever action may be necessary to carry out the agency's mission during an emergency and may issue rules and regulations implementing a mandate of law or an outside authority if they are nondiscretionary [§7117(a)(2) and 5 CFR 2424.11] without engaging in collective bargaining. However, agencies are required to afford unions an opportunity to bargain on the procedures which will be observed in exercising the agency's authority [§7106(b)(2)] and appropriate arrangements to be made for employees adversely affected by the agencies' decisions. In those agencies where one or more unions have been granted national consultation rights [§7113], the agency should follow its established procedures for those parts of the agency-wide shutdown plan effecting conditions of employment. Agencies are responsible for meeting their obligations to negotiate and/or consult with recognized labor organizations, as appropriate. All of this will have to be done in a much shorter time than normal.

Q Should these Q & A's be shared with unions?

A Yes, an agency should share these Q & A's with the union(s) representing its employees if a shutdown seems imminent.

BENEFITS—LEAVE, RETIREMENT, LIFE AND HEALTH INSURANCE

Questions and answers deal with employees on nonpay, nonwork status, (furlough) and those on nonpay, work status. The latter category includes those who are retained to work during the period of lapsed appropriations, but who are not retroactively paid--which would happen if the appropriations authority were never passed or, if passed, failed to provide retroactive authority to pay salaries during the lapsed appropriations period. If employees "volunteer" to work during the lapsed appropriations period, and funding is subsequently provided, their benefits continue as during any normal working period.

LEAVE

Accruing Leave

Q. Will an employee accrue annual leave and sick leave (a) during furlough? (b) during nonpay, work status?

A. a. An employee does not accrue annual or sick leave during each pay period he/she is in a furlough status for the full pay period. If the employee is in a pay status (paid leave or work status) during part of a pay period and in a furlough status for the remainder of the pay period at the beginning and/or end of the furlough, the employee will accrue leave on pro rata status. A table for crediting workdays on a pro rata basis can be found in FPM Supplement 990-2, Book 630, S2-3c(2).

b. An employee who is in a nonpay, work status will not accrue leave during each full pay period he/she is in a nonpay status, and will accrue leave for any partial pay period he/she is in a pay status at the beginning or end of the nonpay period, on the same basis as the employee who is in a furlough status (2a above). However, if the agency receives retroactive funding and the employee is paid retroactively for the nonpay period, the employee will also retroactively be credited with annual and sick leave accrual for that period.

Substituting Leave

Q. Will the employee who has been furloughed be able to substitute annual leave or sick leave for all or a portion of the furlough period if the agency receives retroactive appropriations?

A. The employee who has been furloughed will not be able to substitute annual leave or sick leave for any portion of the furlough period. (38 Comp. Gen. 354; B-181087, Jun 21, 1974; B-188242, 8-9-77)

Q. Will the employee who has been in a nonpay work status be granted annual or sick leave for those days he/she did not work during the period for which retroactive appropriations are authorized?

A. Annual or sick leave (or LWOP) may be granted retroactively for those days an employee does not work during the period of nonpay work status upon payment of retroactive pay for that period provided the absence was requested, approved, and documented in accordance with agency policy in advance of the absence (except in emergency situations).

Use or Lose Leave

Q. Will an employee be subject to forfeiture of annual leave if the period of furlough extends into the subsequent leave year? If the period of nonpay, work status extends into the subsequent leave year?

A. It is important that any annual leave which is subject to forfeiture be scheduled in writing well in advance of the anticipated expiration of appropriations, for use at some period or periods prior to the end of the leave year.

RETIREMENT

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Coverage

Q. What happens to retirement coverage and service credit of an employee who has been furloughed? Of an employee who has been in a nonpay work status for "close-out" activities?

A. Retirement coverage continues without cost to the agency or the furloughed or nonpay work status employee, providing the agency is still in existence. However, service credit for retirement purposes is granted only for time on the rolls in a nonpay status which does not exceed six months in the aggregate in a calendar year. Retirement coverage and retirement credit cease when the agency terminates. See FPM Supplement 831-1, S3-4, 5 U. S. C. 8332(f), 5 U. S. C. 8334, FPM Supplement 831-1, S21-3.

If full or partial retroactive appropriations are received, total employee retirement contributions for the period of furlough are withheld from retroactive pay, and coverage continues as though furlough had not occurred. Total agency contributions are due from the appropriations.

Early Retirement

Q. Does the lapsed appropriations situation trigger eligibility for early retirement?

A. Not as we foresee such temporary lapses. If the agency is definitely terminated, of course, eligibility for early retirement would be triggered.

Refund of Retirement Contributions

Q. Can accumulated retirement contributions be refunded under these circumstances?

A. Only if the agency is ultimately terminated or the employee otherwise becomes eligible to receive it by resigning and having at least a 31-day break in service.

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The requirement that leave must have been scheduled in advance to be considered for restoration will have been met. However, we have no precedent cases to ascertain that scheduled leave which is cancelled because of the requirement to place an employee on furlough under these conditions would meet the requirement of 5 U. S. C. 6304(d)(1)(B) that an exigency of public business exists.

b. In the case of the employee who is continued in a nonpay, work status, it is likely that the agency head (or his delegated authority) would determine that an exigency of major importance existed and annual leave may not be used to avoid forfeiture (5 CFR 630.305), thereby meeting the requirements for restoration.

Lump Sum Leave Payment

Q. If any employee resigns during the lapsed appropriations period, how is the lump sum leave payment processed?

A. If the agency terminates, OPM can take over the necessary processing. Otherwise the lump sum payment is simply delayed until appropriations authority is passed.

income tax, and health benefits, must be withheld.

LIFE INSURANCE

Q. What happens to regular and optional life insurance coverage of an employee who has been furloughed? Of an employee who has been in a non-pay work status for "close-out" activities?

A. Regular and optional life insurance coverage may be continued up to 12 months without cost to the agency or the furloughed or non-pay work status employee, providing agency is still in existence. If agency terminates, there is a 31-day extension of coverage after date of termination during which the employee may convert to a private plan.

If full retroactive appropriations are received:

Total regular and optional life insurance employee contributions for the period of furlough are withheld from retroactive pay and coverage(s) continue as though furlough had not occurred. Total agency contributions are due from the appropriations.

If partial retroactive appropriations are received:

Total regular and optional life insurance employee contributions for the period are withheld from retroactive pay and coverage(s) continue as though furlough had not occurred. Total agency contributions are due from the appropriations. If the amount of salary for a pay period is not sufficient to cover the full withholding, the balance of pay earned, after deduction for retirement or FICA tax, Federal income tax, and health benefits, must be withheld. Further information may be found in FPM Supplement 870-1, S4-2.

HEALTH BENEFITS

Q. What happens to health benefits coverage of an employee who has been furloughed under adverse action procedures for 30 days or less? Of an employee who has been in a non-pay work status for "closedown" activities?

A. Health benefits coverage may be continued up to 12 months without cost to the agency or the furloughed or non-pay work status employee, providing the agency is still in existence. If the agency terminates, there is a 31-day extension of coverage after date of termination during which employee may convert to a private plan (5 CFR 890.303(e) and FPM Supplement 890-1, S8-4).

An employee who has been granted a 31-day extension of coverage and who is confined in a hospital or other institution for care or treatment on the 31st day of the temporary extension is entitled to contribution of the benefits of the plan during the continuance of the confinement but not beyond the 60th day after the end of the temporary extension. 5 CFR 890.401(b)

If full retroactive appropriations are received:

Total employee contributions for the furlough period are withheld from retroactive pay, and coverage continues as though furlough had not occurred. Total agency health benefit contributions are due from the appropriations.

If partial retroactive appropriations are received:

Total employee contributions for the furlough period are withheld from retroactive pay, and coverage continues as though furlough had not occurred. Total agency health benefit contributions are due from the appropriations. If the amount of salary for a pay period is not sufficient to cover the full withholding, no withholding and no agency contributions will be made for the pay period. Deductions for retirement, FICA tax, and Federal income tax have priority over health benefit withholdings. FPM Supplement 890-1, S19-2

CREDITABLE SERVICE

Q. Will the period of furlough or nonpay, work status be creditable for all rights and benefits?

A. a. The period of furlough or nonpay, work status will be creditable for the following purposes to the extent indicated:

- (1) Retirement - 6 months in the aggregate in any calendar year.
- (2) Annual leave accrual rate - 6 months in the aggregate in any calendar year.
- (3) Reduction in force - 6 months in the aggregate in any calendar year.
- (4) Leave accumulation reduction - no reduction in leave accumulation because there is no accrual of leave during the period of furlough or nonpay, work status.
- (5) Within-grade increases - for General Schedule employees, 2 weeks for advancement to steps 2, 3, and 4; 4 weeks for steps 5, 6 and 7; and 6 weeks for steps 8, 9 and 10. For Federal wage system employees see FPM Supplement 532-1, S8-5.
- (6) Severance pay - fully creditable for 12 months continuous service requirement of 5 U. S. C. 5595(b); 6 months in the aggregate in any calendar year creditable for computation of severance pay under 5 U. S. C. 5545(c).

b. In the case of an employee in a nonpay, work status, upon receipt of authority for retroactive payment of salary, the period would become fully creditable to the extent that it would have been creditable under normal working conditions.